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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91185103
Party	Plaintiff Cherokee Nation, a federally recognized Indian Tribe
Correspondence Address	Anthony J. Jorgenson Hall, Estill, Hardwick, Gable, et al 320 South Boston Avenue, Suite 200 Tulsa, OK 74103 UNITED STATES ajorgenson@hallestill.com
Submission	Opposition/Response to Motion
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Signature	/Anthony J. Jorgenson/
Date	06/15/2009
Attachments	Adams-Response.pdf (10 pages)(180193 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

CHEROKEE NATION, a federally recognized Indian tribe,	
Opposers,	
v.	**Opposition No. 91185103**
TIFFANY ADAMS,	
Applicant.	

OPPOSER'S RESPONSE TO APPLICANT'S NOTICE OF CLARIFICATION

Opposer, Cherokee Nation, submits this Response to Applicant's Notice of Clarification and respectfully requests that the Board decline to consider any further briefs or other materials Applicant may belatedly file concerning Opposer's Motion for Summary Judgment. In her Notice of Clarification, and despite having previously filed a response to Opposer's Motion for Summary Judgment, Applicant states that she intends to file an additional brief opposing Opposer's Motion for Summary Judgment on or before June 19, 2009.

The Board should refuse to consider further briefing from Applicant concerning Opposer's Motion for Summary Judgment and should enter judgment as a matter of law in favor of Opposer on the basis of the record presently before the Board and on the grounds that: (i) Applicant has previously filed her response to the Motion for Summary Judgment; and (ii) Applicant admits that she cannot proffer sufficient evidence to demonstrate the existence of a genuine issue of material fact precluding judgment for Opposer as a matter of law.

ARGUMENTS AND AUTHORITY

I. THE TRADEMARK RULES PROHIBIT APPLICANT FROM FILING ADDITIONAL BRIEFS IN OPPOSITION TO OPPOSER'S MOTION FOR SUMMARY JUDGMENT

In her Notice of Clarification, Applicant asserts that her May 11, 2009 response to Opposer's Motion for Summary Judgment was not a response brief, but merely, a "Motion to Strike" Opposer's

Motion for Summary Judgment. However, a motion to strike a motion for summary judgment is a procedural nullity.

Pursuant to Fed. R. Civ. P. 56(e)(2), T.B.M.P. §§ 113.05, 528.02 and Trademark Rule 2.119(c), Applicant was required to file a response brief, or a motion under Fed. R. Civ. P. 56(f), in response to Opposer's Motion for Summary Judgment. Neither the Federal Rules of Civil Procedure, nor the Trademark Rules, recognize a "motion to strike" a motion for summary judgment. Indeed, Applicant cites no authority for the proposition that she may move to strike Opposer's Motion for Summary Judgment requesting that the Motion be denied, and after Opposer has filed its Reply, file a separate "response" to that Motion.

Applicant's characterization of her May 11, 2009 response brief as a "Motion to Strike" is nothing more than a thinly-veiled attempt to have the last word regarding Opposer's Motion for Summary Judgment and to gain an unfair procedural advantage. Considering that Opposer has already filed its Reply in support of the Motion for Summary Judgment, the tactical advantage Applicant seeks to gain by this procedural maneuvering is significant. Moreover, the label Applicant attaches to her "Motion to Strike" does not control. See Andrews v. United States, 373 U.S. 334, 338 (1963) (the substance of a party's pleadings, not the title employed, controls the issues to be adjudicated); National Presto Indus., Inc. v. Dazey Corp. 107 F.3d 1576, 1581 (Fed. Cir. 1997). The substance of Applicant's "Motion to Strike," not its form, controls its disposition. Id.

In her "Motion to Strike," Applicant addresses, albeit in conclusory fashion, the merits of Opposer's Motion for Summary Judgment and specifically requests that Opposer's Motion be denied. See Applicant's Response at 6. Applicant's May 11, 2009 "Motion to Strike" was filed using the Electronic System for Trademark Trial and Appeals ("ETTSA") of the U.S. Patent and Trademark Office under the event for, "D's Opposition/Response to Motion," and not as a stand-alone "Motion to Strike." Finally, any suggestion that Applicant did not intend her "Motion to Strike" to be construed as a response to Opposer's Motion for Summary Judgment is further belied by statements Applicant's counsel made in an e-mail communication to Opposer's counsel shortly after filing the Response. See E-Mail dated

May 12, 2009, from Anna M. Vradenburgh to Brandon Rule, Ex. 1. In that e-mail, Applicant's counsel specifically states:

> This is to advise you that we filed a response to your Motion for Summary Judgment yesterday [May 11, 2009].

Id. (emphasis added). That email also confirms the parties' prior agreement that Opposer would have 30 days within which to file its reply to Applicant's response and thereby, further evidences Applicant's intent that her "Motion to Strike" be deemed a response to Opposer's Motion for Summary Judgment. Id. At no time prior to filing her Notice of Clarification has Applicant or her counsel suggested that Applicant's "Motion to Strike" was anything other than a response to Opposer's Motion for Summary Judgment, or that a further responsive brief would follow. Id. Simply put, regardless of whether Applicant now characterizes her response as a "Motion to Strike," the substance of Applicant's "Motion to Strike" coupled with Applicant's counsel's confirmation after that response was filed, establishes that the "Motion to Strike" is, in fact, a response to Opposer's Motion for Summary Judgment.

Trademark Rule 2.127(e)(1) provides that the only briefs permitted in considering a motion for summary judgment are the motion, a response (or motion under Rule 56(f)), and a reply. See 37 C.F.R. § 2.127(e)(1) ("The Board will consider no further papers in support of or in opposition to a motion for summary judgment."). Applicant's "Motion to Strike" included a request that Opposer's Motion for Summary Judgment be denied and an untimely and deficient request for additional discovery pursuant to Fed. R. Civ. P. 56(f). Thus, Applicant's "Motion to Strike" was intended to, and does, constitute a response brief within the meaning of Trademark Rule 2.127(e)(1), to which Opposer timely filed its Reply. The Trademark Rules expressly prohibit the filing of additional briefs regarding Opposer's Motion for Summary Judgment. Therefore, Applicant's statement in her Notice of Clarification that an additional brief will be filed on or before June 19, 2009 is entitled to no deference and any efforts by Applicant to submit additional briefing must be precluded.

II. APPLICANT'S EFFORTS TO FILE AN ADDITIONAL BRIEF IN RESPONSE TO OPPOSER'S MOTION FOR SUMMARY JUDGMENT IS AN EXERCISE IN FUTILITY

Even assuming Applicant were permitted to file an additional brief in opposition to Opposer's

Motion for Summary Judgment, that extraneous briefing would not aid the Board in ruling on Opposer's Motion for Summary Judgment. Applicant has admitted in her previously filed "Motion to Strike" that she cannot proffer evidence to create a genuine issue of material fact sufficient to preclude summary judgment in Opposer's favor. See Motion to Strike at 5.

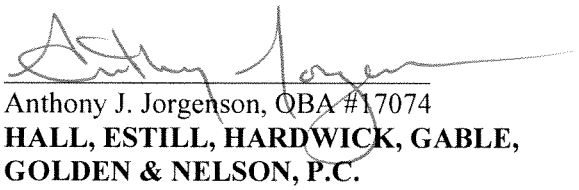
Applicant's statements in her "Motion to Strike," made in connection with her untimely and baseless request for relief under Fed. R. Civ. P. 56(f), are clearly inconsistent with the suggestion in her Notice of Clarification that such evidence exists or can be produced. As evidenced by Applicant's failure to produce initial disclosures and her inability to respond to Opposer's written discovery requests, Applicant certainly has not produced any such evidence to date. Furthermore, Opposer, having expended substantial time, effort and money to prepare and file its Reply in support of Opposer's Motion for Summary Judgment would be prejudiced were Applicant now permitted to recant her previous statements and file additional materials to which Opposer would be compelled to respond. Accordingly, Applicant is judicially estopped from now submitting a brief in response to Opposer's Motion for Summary Judgment which purports to offer evidence--which she has earlier admitted she cannot produce--in an effort to preclude judgment as a matter of law in Opposer's favor. See Transclean Corp. v. Jiffy Lube International, Inc., 474 F.3d 1298, 1306-07 (Fed. Cir.), cert. denied, 128 S. Ct. 186 (2007).

Because Applicant has previously admitted in response to Opposer's Motion for Summary Judgment that she cannot offer evidence sufficient to create a genuine issue of fact for trial, any additional response to Opposer's Motion for Summary Judgment Applicant might belatedly file is wasteful and futile. The purpose of summary judgment is to avoid an unnecessary trial for which there can be only one outcome. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Kustom Signals, Inc. v. Applied Concepts, Inc., 264 F.3d 1326, 1332 (Fed. Cir. 2001), cert. denied, 535 U.S. 986 (2002). Accordingly, the Board should disregard Applicant's Notice of Clarification and any additional briefs or other materials Applicant might later attempt to file purporting to oppose Opposer's Motion for Summary Judgment. Opposer's Motion for Summary Judgment having been fully briefed, should be considered and granted on the basis of the record presently before the Board.

CONCLUSION

For the foregoing reasons, the Board should refuse to consider further briefing from Applicant concerning Opposer's Motion for Summary Judgment and should enter judgment as a matter of law in favor of Opposer on the basis of the record presently before the Board.

Respectfully submitted,



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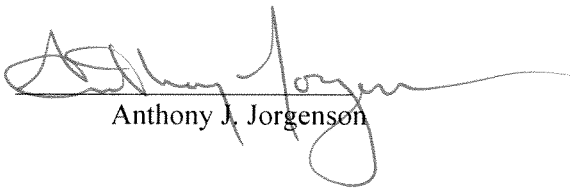
Facsimile (918) 594-0505

ATTORNEYS FOR OPPOSER, CHEROKEE NATION

CERTIFICATE OF FILING

I, Anthony J. Jorgenson, hereby certify that a copy of the foregoing Opposer's Response to Applicant's Notice of Clarification is being filed with the Electronic System for Trademark Trial and Appeals ("ETTSA") of the U.S. Patent and Trademark Office on this 15th day of June, 2009.

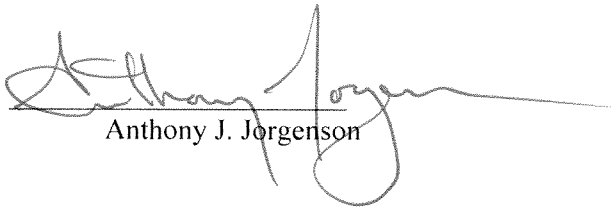


Anthony J. Jorgenson

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on this 15th day of June, 2009, a true and correct copy of the above and foregoing Opposer's Response to Applicant's Notice of Clarification was served upon Applicant by first class mail, proper postage prepaid, at the following address:

Anna M. Vradenburgh
Piccionelli & Sarno
2801 Townsgate Rd., Suite 200
Westlake Village, CA 91361



Anthony J. Jorgenson

996179.1:231629:02060

Exhibit 1

Brandon Rule

From: Anna M. Vradenburgh [anna@piccionellisarno.com]
Sent: Tuesday, May 12, 2009 12:23 PM
To: Brandon Rule
Subject: Cherokee opposition

Hi Brandon,

This is to advise you that we filed a response to your Motion for Summary Judgment yesterday. I am out of town for INTA commencing tomorrow through the 20th of May.

When we originally agreed to extensions, we agreed that you could take 30 days to respond to any response we filed. Although the Board did not acknowledge this part of the agreement in its Order, we are reiterating our consent in this regard. You may file a request for extension of time to respond for 30 days with our consent. If you are able to get it to me prior to 4 pm today, I can sign it, but otherwise you may file without our signature and simply advise the Board of our consent.

Best regards,
Anna

--
Anna M. Vradenburgh
Piccionelli & Sarno
2801 Townsgate Road, Suite 200
Westlake Village, California 91361
Telephone: 805-497-5886
Facsimile: 805-497-7046

Exhibit 2

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

CHEROKEE NATION, a federally recognized Indian tribe,	
Opposer,	
v.	**Opposition No. 91185103**
TIFFANY ADAMS,	
Applicant.	

DECLARATION OF BRANDON RULE

1. I am an attorney with the law firm of Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C., counsel for the Opposer in this proceeding, I submit this Declaration in support of Opposers' Response to Applicant's Notice of Clarification.

2. I have personal knowledge of the matters asserted in this Declaration by virtue of my role as counsel for Opposer and correspondence with counsel for Applicant, Anna M. Vradenburgh.

3. Attached as Exhibit 1 to Opposer's Response to Applicant's Notice of Clarification is a true and correct copy of an e-mail I received from counsel for Applicant, Anna M. Vradenburgh, on May 12, 2009, concerning the response Applicant filed on May 11, 2009 to Opposer's Motion for Summary Judgment.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct.

Brandon Rule

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